2003

Cuma S. Hoopiiaina v. Steven Williams : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CUMA S. HOOPIIAINA, et. al.,

Plaintiffs/Appellee,

v.

STEVEN WILLIAMS, et. al.,

Defendants/Appellee.

District Court No. 950908402 CV

Case No. 20030064-CA

BRIEF OF APPELLEE

Appeal from the Third Judicial District court,
Salt Lake County, State of Utah
Judge Sandra N. Peuler

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October 19, 2004

Clerk of Utah Court of Appeals
450 South State Street
Salt Lake City, Utah 84114-0210

Dear Clerk:

Please accept this letter as a Citation of Supplemental Authority for Case No. 20030064 CA, pursuant to Rule 24 (i) Utah Rules of Appellate Procedure.

The citation is pertinent to Rule 7, Utah Rules of Civil Procedure which specifies "Pleadings", and separately " Motions".

This citation is offered in reference to Point II pages 10 and 11 of Brief of Appellee.

I have mailed copies to counsel for the appellant.

Respectfully,

George K. Fadel

GEORGE K. FADEL
ATTORNEY FOR APPELLEE

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COMPLETE LIST OF ALL PARTIES IN DISTRICT COURT

The parties in the district court were Cuma S. Hoopiiaina, Steven Williams, Kyle Williams and J. Richard Williams. Appellant Lucille T. Williams is a non-party seeking intervention.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules and Regulations

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. Section 78-2a-3(2)(j).

GOVERNING LAW

The following statutory provisions are involved in the outcome of this appeal: Rule 24(a), *Utah Rules of Civil Procedure;* 24(b), *Utah Rules of Civil Procedure,* Rule 24(c) *Utah Rules of Civil Procedure;* and Rule 25(c) *Utah Rules of Civil Procedure.*

QUESTIONS PRESENTED AND STANDARD FOR REVIEW

The issue before this court is whether the trial court erred when it denied the Motion to Intervene filed by Appellant, Lucille T. Williams, in the trial court case. The court of appeals reviews the trial court's ruling on a motion to intervene *de novo.* In re: Marriage of Gonzalez, 1 P.3d 1074 (Utah 2000).

Subparts of the stated main issue are:

(a) Whether the motion to intervene was timely when made after conclusion of the trial and after the trial court indicated from the bench what her ruling would be subject to review of two items which the court denied to further study. Republic Ins. Group v. Doman, 774 P.2d 1130, 1131 (Utah 1989).

(b) Whether failure of appellant to accompany the motion to intervene with a pleading setting forth the claim or defense for which intervention is sought is a procedural error precluding intervention. Rule 24 (c) *Utah Rules of Civil Procedure*; Hirshorn on behalf of Carbon Monoxide Eliminator Corp. v. Mine Safety Appliances Co.,186 F.2d 1023 (1951 CA 3 P2).

(c) Whether a transferee of some interest in the subject matter has a right to intervene. Lundahl v. Quinn, 67 P.3d 1000, 1003 (Utah 2003). Briggs v. Hess, 252 P.2d 538, 539 (Utah

1953).

(d) Whether Lucille Williams is barred by collateral estoppel and issues preclusion on the main issue of the manner of use of the easement and as such has no right to intervene where other damages are not sought against her. Marcris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214, 1224 (Utah 2000).

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below.*

1. On or about December 5, 1995, a complaint was filed in the Third District Court by plaintiff Malualani B. Hoopiiaina against defendants Steven Williams, Kyle Williams and J. Richard Williams seeking to enjoin defendants from interfering with plaintiff's right of ways over defendants' property located at 355 West 700 South in Salt Lake City, Utah (the "Property"). In the district court action the plaintiff alleged that he owned a right of way for benefit of plaintiff's property, the west half of Lot 6, Block 12, Plat "A" over real property of the defendants described as Lot 5, Block 12 Plat "A" for a perpetual right of way of a spur track crossing the property of defendants. (R1-3).

2. On December 22, 1995, the named defendants filed their answer stating as an affirmative defense "that they are the fee owners of Lot 5, Block 12, Plat A, Salt Lake City Survey and that pursuant to a Judgment in the Third District Court dated July 6, 1993, the Court ruled that plaintiff was the owner of a perpetual easement for a spur track appurtenant to the West on-half of Lot 6, Block 12, Plat "A". . . ." Also as a second defense the answer stated that the defendants "specifically allege that defendants are the fee owners of their property." (R7).

3. Plaintiff filed a Notice of Readiness for trial April 9, 1996. (R11).

4. The case was set for trial for April 1, 1997. (R15).

5. Plaintiff filed a motion for partial summary judgment prohibiting defendants from interfering with plaintiff's use of the easement, February 10, 1997. (R17-50).

6. On March 14, 1997, counsel for both parties stipulated to a continuance of trial to a future date to be determined. (R51).

7. On March 27, 1997, defendants filed a memorandum opposing summary judgment and alleged as a material fact that plaintiff is the owner of a perpetual easement "over the property of the defendants." (R60).

8. Malu B. Hoopiiania died May 20, 1997, and his wife Cuma as personal representative moved for her substitution as plaintiff. (R68).

9. On January 6, 2000, a telephone conference set pretrial for April 24, 2000 and a bench trial before Judge Sandra Peuler for May 3, 2000. A mediation session was ordered. (R112).

10. On February 6, 2001, Judge Peuler granted plaintiff's motion to substitute parties and file an amended complaint. (R245).

11. February 9, 2001, an amended complaint was filed naming Cuma as personal representative and individually as plaintiff also joining her son, Marlyn M. Forsyth as plaintiff against Steven Williams, Kyle Williams and J. Richard Williams. (R247).

12. January 17, 2002, a telephone conference set a new trial date for April 23, 2002.

13. On April 24, 2004, a bench trial was held and the court indicated a proposed ruling subject to considering two items. (R273)

14. April 29, 2002, plaintiffs filed a post-trial memorandum on whether previous litigation restricted the easement to a spur track, whether proper parties were before the court,

and whether subsequent owners of Lot 5 are bound by the court's ruling on the easement (R275-297).

15. Defendants filed a post-trial memorandum May 23, 2002 (R276-366), reciting the conveyances among the Williams' families and questioning whether Lucille could receive the interest from a previously created irrevocable trust (R306).

16. The May 23, 2002, memorandum of defendants attached a copy of a deed dated July 26, 1977 in which the Grantors, Koch, conveyed the servient property to Steven Williams, one-half, and to Steven Williams, Trustee under the irrevocable trust created for the benefit of Stacy Robert Williams. (R319).

B. *Statement of Facts.*

In addition to the facts set forth in "A" above, appellees supplement with additional facts.

J. Richard Williams, the father of Steven Williams and husband of Lucille T. Williams, throughout the 1993 litigation as well as the litigation commenced in 1995 has represented that he has been the sole occupant of the servient estate and the beneficial owner thereof since 1977. In the transcript of the trial, April 23, 2002 (R934), beginning at page 154, Richard was asked how long he owned the property, to which he replied, "About 25-30 years, there's never been a train on it." He further testified that no one except himself used the spur track for 25 to 30 years during which time he used it for parking automobiles (Tr 155-157).

He placed blacktop over the tracks 15 or 20 years ago so he could use the area as a parking lot (Tr 160-161). Richard also poured a concrete slab in one area saying "we've been in Court here for the last 15 or 20 years, one of the times, the Judge said it was all right for me to utilize the property. That's my understanding, that I could use- -utilize and use my property

because I was paying taxes on it." (Tr 162). He identified Exhibit 11, a photo of a building he had erected over the tracks and easement. (Tr 168). Richard said that he owned all of the antique vehicles "down there, inside, or outside or everywhere." (Tr 171). Testifying in response to questions from his attorney, Richard modified his claim of ownership saying, "I used to think I owned it at one time, but I guess not" when told that a certain deed named his son, Steven Williams individually and as trustee for Stacy Robert Williams (Tr 179), further stating "I think the family all agrees with what I do." (Tr 180).

His attorney showed him a transcript of the trial in 1993 (Tr 182) to review statements made in the previous trial. Then on redirect examination, Richard was shown page 54 of the previous transcript where he was asked whether he was the owner of part of Lot 5 and answered "yes," but on April 23, 2002, he qualified his answer saying, "I-I must have controlled, had some control over it, so I don't know who owned it then, but I had some control over it." (Tr 187). He added that no one but himself has been responsible for placing obstructions on that spur track. (Tr 188).

In the 1992-1993 action, the plaintiffs named were "Steven Williams and Kyle Ann Williams" v. Hoopiiaina and the Judgment and Decree in that case dismissed the complaint and decreed that the defendant owned a perpetual easement appurtenant to the West one-half of Lot 6, over and across the property of the "plaintiffs" described as Lot 5, Block 12, Plat A. (R143-144).

The record beginning at page 563 with a letter directly from J. Richard Williams addressed "To the Honorable Judge Sandra Pueler" filed October 24, 2002 (some 8 months after trial) enclosed certain information which he desired the Judge to review (R563-583). Richard

included a copy of a letter from Attorney Ford Scalley to Malu Hoopiiaina and his lessee dated April 8, 1986, which referenced as follows: "Re: My clients: Richard Williams, Steven Williams, individually and Steven Williams as Trustee under irrevocable trust created for benefit of Stacy Robert Williams." The letter begins, "Please be advised that I represent Richard Williams and Steven Williams who are beneficial owners of all of Lot 5 Block 12, Plat A, ..." (R573) (included in addendum).

Lucille's motion to intervene was filed six days later on October 30, 2002. An Answer to the original complaint was filed December 22, 1995 (R6) and alleged, "As an affirmative defense, defendants allege that they are fee owners of Lot 5, Block 12, Plat A. . . ." The defendants named in the Answer were: "Steven Williams, Kyle Williams, and J. Richard Williams." No other claimed ownership was indicated on the record until after trial when on June 3, 2002, Nolan J. Olsen, as attorney for the same named defendants filed an "Answer to Amended Complaint" (R379) alleging as an affirmative defense in paragraph 3 that "Defendants allege that as of this date, the Defendants have no right title and interest in and to the subject property described as Lot 5, Block 12, Plat A, Salt Lake County, Utah and allege that the property is owned by Lucille Williams." (R380).

Judge Peuler signed the Amended Findings of Fact and Conclusions of Law November 26, 2002 (R648-656) and an Amended Judgment & Decree on November 26, 2002. (R658-660). Copies of the Findings and Judgment are included in the addendum as a further statement of facts.

The defendants' answer to the amended complaint filed June 3, 2002, was stated in paragraph 1 of the Conclusions of Law to be untimely and was thereby stricken. (R655).

Lucille T. Williams has at no time alleged that her defenses would differ from those asserted in previous proceedings and has not detailed any items to support her claim that her interest was not adequately represented by existing parties.

SUMMARY OF ARGUMENTS

The action was commenced by Hoopiiaina December 5, 1995, and finally came to trial April 23, 2002. At the conclusion of the trial on that same date, the Court made preliminary findings and rulings indicating that the easement could be used for alternate means of transportation and the obstructions should be removed within ninety days.

Lucille filed a notice to intervene November 1, 2002. In the interim between April 23 and November 1, 2002, there were post-trial memoranda, discussions on proposed findings and other matters. Judge Peuler signed the amended findings and judgment November 26, 2002.

The motion to intervene was not a timely application under Rule 24(a).

The motion did not state the grounds for the motion and was not accompanied by a pleading setting forth the claim or defense for which intervention was sought as required by Rule 24(c).

From 1995 until July 11, 2000, Lucille T. Williams had no interest of record in the servient property. She, therefore, was a transferee under Rule 25(c) and the action continued against the original parties. No motion for substitution was filed or granted.

Even if Lucille had an interest and was made party, she would be barred by collateral estoppel and issue preclusion on the issue of manner of use of the easement.

ARGUMENT

POINT I: LUCILLE'S MOTION TO INTERVENE WAS NOT A TIMELY APPLICATION.

Rule 24(a) *Utah Rules of Civil Procedure* provides:

> (a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The action was commenced by Hoopiiaina December 5, 1995, and finally came to trial April 23, 2002. At the conclusion of the trial on that same date, the Court made preliminary findings and rulings indicating that the easement could be used for alternate means of transportation and the obstructions should be removed within ninety days.

Lucille filed a notice to intervene November 1, 2002. In the interim between April 23 and November 1, 2002, there were post-trial memoranda, discussions on proposed findings and other matters. Judge Peuler signed the amended findings and judgment November 26, 2002.

The motion to intervene was not a timely application under Rule 24(a). Lucille's affidavit filed September 4, 2002 (R479-81) recites that Lot 5 was purchased by her in 1977 and was in her son's and daughter's names, as well as in trust for another son until July 11, 2000 at which time Steven Williams and his wife Kyle A. Williams conveyed the property to her; however as stated above, her motion to intervene was not filed until November 1, 2002.

The trial court denied the motion to intervene by a minute entry dated December 6, 2002, as follows (R896):

> Before the Court is a Notice to Submit for Decision on Motion to Intervene filed by Lucille Williams. The Court having reviewed the pleadings filed in this matter, now enters the following ruling.
>
> The Motion to Intervene is denied. This matter has previously been tried and the Court ruled on all issues raised by the parties to the action and framed by the issues in the pleadings. While A Motion to Intervene may have been appropriate at an earlier proceeding, this matter has concluded through trial. Based upon that, the Court denies the movant's Motion.

In the case of Republic Ins. Group v. Doman, 774 P.2d 1130, 1131 (Utah1989), the Utah Supreme Court held:

> The first requirement under both rule 24(a) and rule 24(b) is that the intervenor make "timely application." In *Jenner v. Real Estate Services*, 659 P.2d 1072, 1073-74 (Utah 1983), we examined the requirement of "timeliness." There we stated: "Use of the word 'timely' in the Rule requires that the timeliness of the application be determined under the facts and circumstances of each particular case, and in the sound discretion of the court."
>
> The "facts and circumstances" of this case are as follows: Defendant knew this action was pending prior to his attempt to intervene. His motion for intervention stated, "Movant had previously been under the impression that defendants were adequately represented by counsel and their interests were adequately protected and represented." His motion was not filed until every fact necessary for a ruling on the motion for summary judgment had been deemed admitted and a ruling had been requested on the motion. Given these facts and circumstances, i.e., Duke's apparent notice and opportunity to intervene at an earlier stage of the proceeding and the ripeness of the case for summary judgment at the time the motion to intervene was made, the trial court did not abuse its discretion in denying the motion. Further, as a nonparty, Duke has no standing now to challenge on appeal the court's ruling on the motion for summary judgment.

The defendants filed copies of certain deeds naming Lucille. A Warranty Deed (R507) from Koch to Lucille Williams recorded November 5, 1973, conveys to her all of Lot 5. Lucille by deed recorded August 11, 1977 (R508) conveyed a portion of Lot 5 to Steven Williams individually an undivided one-half and to Steven Williams "under the irrevocable trust created

for the benefit of Stace Robert Williams, as to an undivided one-half interest." By deed dated August 28, 1980 (R509), Steven Williams as trustee of that irrevocable trust conveys the North 215 feet of Lot 5 to Steven Williams and Kyle Williams, his wife. This raises the legal question as to whether the conveyance from the trustee of an irrevocable trust removes the property from the trust or merely transfers the interest to new trustees. In any event it would appear that Stace Robert Williams remains the beneficiary of an undivided one-half interest.

Lucille's affidavit (R479 at 480) claims to have received Lot 5 back on July 11, 2000, pursuant to an attached Exhibit A. The first exhibit attached to the affidavit is a Quitclaim Deed form Steven Williams and Kyle A. Williams to Lucille Williams. There was no deed which could transfer the interest of Stace Robert Williams in the irrevocable trust to Lucille Williams. The only present interest Lucille can claim comes from the Quitclaim Deed of Steven and Kyle some four and one-half years after this litigation commenced. Whatever interest she received was represented in this case by her grantors, Steven Williams and Kyle Williams, the named defendants. Lucille's application was not timely and any interest she had in the property was being represented by her son and daughter-in-law from whom she may have acquired an interest in the property.

POINT II: LUCILLE FAILED TO COMPLY WITH RULE 24(c) BY NOT SERVING WITH THE MOTION A PLEADING.

Rule 24(c) *Utah Rules of Civil Procedure* provides: "(c) *Procedure*. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

The failure of Lucille to file a pleading with her motion to intervene is sufficient basis for the court to deny intervention. In the case of Hirshorn on behalf of Carbon Monoxide Eliminator Corp. v. Mine Safety Appliances Co., 186 F.2d 1023 (1951, CA3 Pa.), the court granted a motion to dismiss an appeal from denial of a right to intervene in a stockholder's derivative action where the petitioner had failed to comply with Rule 24(c) of the Federal Rules of Civil Procedure requiring the intervenor to file a pleading setting forth the claim for which intervention was sought and was therefore not entitled to intervene as of right.

POINT III: THE CASE WAS PROPERLY CONTINUED AGAINST THE NAMED DEFENDANTS WITHOUT INCLUSION OF LUCILLE AS A TRANSFEREE.

Rule 25(c) *Utah Rules of Civil Procedure* provides:

> (c) *Transfer of interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

Although Lucille filed a belated motion to intervene, she never filed a motion for substitution of parties, and even had she done so, the court could properly continue the case against the original named defendants. In the case of Lundahl v. Quinn, 67 P.3d 1000 (Utah 2003) the Utah Supreme Court held at page 1003:

> Where a chose in action is purportedly conveyed after a legal action concerning it already has been filed by the original party in interest, the assignee may be required to obtain a substitution of parties according to the dictates of rule 25(c) of the Rules of Civil Procedure; specifically: "the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest transferred to be substituted in the action." Utah R. Civ. P. 25(c). While rule 25(c) speaks in permissive rather than mandatory terms, it is clear courts cannot be compelled to recognize a substitution of parties at the whim of the movant. *See, e.g., Calder Bros. Co. v. Anderson,* 652 P.2d 922, 927 n.6

(Utah 1982) (upholding denial of motion for substitution of real party in interest, where motion was filed subsequent to default judgment). The provision that action "may be continued by or against the original party," unless the court grants a motion for substitution, preserves the court's inherent power to manage the case without undue disruption, confusion, or interference. *See Briggs v. Hess,* 122 Utah 559, 561, 252 P.2d 538, 539 (1953).

POINT IV: LUCILLE IS BARRED BY COLLATERAL ESTOPPEL AND ISSUE PRECLUSION ON THE ISSUE REGARDING MANNER OF USE OF THE EASEMENT.

Neither Lucille Williams' Affidavit nor her motion raise or suggest any defense to the merits of Plaintiffs' Complaint and she is barred by collateral estoppel or issue preclusion as well, on the issue of manner of use of the right of way. The Utah Supreme Court, in the case of Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214, 1224 (Utah 2000), held:

> C. Privity
>
> Finally, the fourth element of the test outlined above also permits the application of collateral estoppel in this case. Unlike the doctrine of claim preclusion, issues preclusion does not require that "*both cases* . . . involve the *same parties* or their privies." *Madsen*, 769 P.2d 245, 247 (Utah 1988) (emphasis added). Rather, issue preclusion applies even if only "the party against whom the [doctrine] is asserted [was] a party or in privity with a party to the prior adjudication." *Swainston,* 766 P.2d at 1061; *see also Wilde v. Mid-Century Ins. Co.*, 635 P.2d 417, 419 (Utah 1981) ("[m]utuality of parties is no longer essential" for collateral estoppel purposes). In this case, although Neways was a nonparty to *Macris I*, the party *against* whom the doctrine of collateral estoppel is asserted is Macris. It is clear that Macris & Associates, the plaintiff herein, is the same party as Macris & Associates, the plaintiff in *Macris I.* Therefore, the party *against* whom the doctrine is asserted–Macris–was a party to the prior adjudication.

"Privity" is defined in Black's Law Dictionary as "mutual or successive relationship to the same rights of property." Lucille Williams, as a tenant in common with Steven Williams and Kyle Williams whether as trustee or individually has a mutual and successive relationship to the same rights and obligations in the property.

Plaintiffs only claim damages against J. Richard Williams who readily admitted that he

was the occupant of the servient property for over 25 years and he alone obstructed the use of the easement by the plaintiffs.

Richard was defending against the plaintiffs more as an owner, asserting ownership rights, rather than as an occupant. Lucille in claiming an ownership interest and being the wife of Richard should be charged with notice of the many years of controversy dating at least to 1992 when the Williams commenced an action to quiet title as against the easement.

CONCLUSION

The Court should affirm the action of the trial court which denied intervention by Lucille Williams.

Dated this 28 day of July, 2004.

George K. Fadel
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I mailed copies of the attached Brief of Appellee to:

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on the 28 day of July, 2004.

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02 NOV 26 PM 3:16

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CUMA S. HOOPIIAINA, personal representative of the estate of Malualani B. Hoopiiaina, CUMA S. HOOPIIAINA, individually, and MARLIN M. FORSYTH, individually, Plaintiffs, vs. STEVEN WILLIAMS, KYLE WILLIAMS and J. RICHARD WILLIAMS, Defendants.	**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 950908402 CV Honorable Sandra N. Peuler

This cause came on regularly for trial before the Honorable Sandra N. Peuler, District Judge of the above entitled Court on April 23, 2002. The Plaintiffs appeared in person and by their Attorney George K. Fadel. The Defendants appeared in person and by their attorney Nolan J. Olsen. The Court received evidence of the issues raised by the Plaintiffs' Amended Complaint And Supplemental Proceedings and made bench rulings on some issues. The Court provided the parties an opportunity to file post trial memoranda on two issues for further consideration by the Court prior to a final decision. The Court having read the post trial memoranda and by Minute Entry dated November 5, 2002, granted Defendants objections to the issue of money damages,

648

and being fully advised in the cause, now makes the following:

FINDINGS OF FACT

1. The Plaintiffs ("Hoopiiainas") are the owners and occupants of property at 345 West 700 South, Salt Lake City, Salt Lake County, Utah described as being the west half of Lot 6, Block 12, Plat "A" Salt Lake City, Survey. The Hoopiiainas also own a right of way over the real property of the Defendants ("Williams") described as Lot 5, Block 12, Plat "A" Salt Lake City Survey for perpetual right of way of a spur track crossing the property of the Defendants to serve for the use and benefit of the said west half of Lot 6, Block 12 as an appurtenance to that land in said Lot 6.

2. The Williams have obstructed the right of way by storing automobiles, asphalt paving and concrete slabs, buildings and otherwise, and have refused to remove the obstructions, thus preventing the Hoopiiainas' use of the right of way. The Defendant, J. Richard Williams, has occupied the said Lot 5 for over twenty years in connection with his business and hobby of restoring and dealing in antique, classic automobiles displayed as a museum on said Lot 5, with full knowledge of relatives who from time to time held the legal title and consented to the use of said Lot 5 by J. Richard Williams as the apparent occupant in control of the said premises for over 25 years.

3. Steven Williams and Kyle Ann Williams commenced an action in the above entitled Court against Malulani B. Hoopiiaina, Trustee of the Malulani B. Hoopiiaina Trust, Civil No. 92090600 on October 29, 1992, captioned a "Complaint To Quiet Title" which cause was assigned to the Honorable Homer F. Wilkinson, District Judge. The complaint alleged that the plaintiffs/Williams had been in possession of said Lot 5 for more than 18 years, and that the

649

defendant/Hoopiiaina, current owner of the west half of Lot 6, claims a right of way for a railroad spur granted by the Williams' predecessor to the Oregon Shortline Railroad Company on or about April 16, 1917. The complaint further alleged that the Union Pacific Railroad on behalf of the Oregon Shortline Railroad filed a Disclaimer which terminated the spur track easement. Judge Wilkinson's Findings of Fact and Conclusions of Law, filed July 6, 1993, find that the named plaintiffs and named defendant were owners of their respective tracts in Lot 5 and Lot 6 and that the Disclaimer did not terminated the spur track easement to Lot 6. Judge Wilkinson concluded that Hoopiiaina is the owner of a perpetual easement for the spur track over Williams' property which was obtained by written recorded grant "which was not conditioned upon any specific purpose associated with the spur track easement of 1917 granted to the railroad company, and that the spur track easement of 1947 granted to Hoopiiaina continues as an easement appurtenant to Hoopiiaina's property over and across the property of the Williams." Judge Wilkinson filed a Judgment and Decree on July 6, 1993, which dismissed Williams' complaint and decreed that Hoopiiaina is the owner of a perpetual easement for a spur track appurtenant to the West one-half of Lot 6 across Williams' property pursuant to an Agreement Creating Right of Way dated February 8, 1947, which continues in full force and effect. Neither the findings nor decree by Judge Wilkinson limited in any way the use of the spur track nor mentioned the manner of use.

The Utah Court of Appeals Memorandum Decision, January 31, 1995, affirmed the trial court's decision denying the Williams' action to quiet title against Hoopiiaina's easement and the conclusion that Hoopiiaina is the owner of a perpetual easement for the spur track over the property of the Williams, quoting pertinent portions of the trial court's conclusions.

4. The instant action was filed by Malualani B. Hoopiiaina on December 5, 1995, to

650

enjoin the Williams from obstructing and interfering with his use of the right of way. Upon Malualani B. Hoopiiaina's death, the present Plaintiffs filed an Amended Complaint and Supplemental Pleadings pursuant to leave of Court.

5. During the bench trial on April 23, 2002 the Court heard testimony of Ryan Creamer, a tenant of Hoopiiaina, who testified as to the expenses, burden and inconvenience of not being able to use the easement for deliveries using large trucks. Mr. Creamer has been limited to use of a driveway and adjoining street with some difficulty and delay as an alternate to use of the easement for direct ingress and egress.

Marlyn Forsyth, who was born in 1948, testified that he is a step-son of Malualani B. Hoopiiaina and for several years from the time he was a child he worked for Malualani on Lot 6 until 1972, during which time he observed the use of the easement by trucks for deliveries, and the towing of railroad cars by tractors along the easement. He frequently saw railroad cars parked on the easement awaiting the locomotive to retrieve the same, sometimes after many days. He identified color photos he had taken showing the obstruction of the easement by Richard Williams who asphalted and cemented over the tracks on the easement, parked many older vehicles on the easement, and more recently, built a structure on the northerly side which appeared to be a garage or storage building obstructing the entrance from 700 South street.

Richard Williams testified that he occupied and exercised control over the Lot 5 buildings and premises for use in his antique automobile business for many years and he stored vehicles on and paved the easement in connection with his use as well as built a structure at the entrance of 700 South. He had no objection to the use of the easement for a spur track if and when it was connected to a railroad track. He could not state how use of the easement for motor vehicles

651

would increase the burden on the Williams' property.

6. The Court read the Agreement Creating Right of Way admitted into evidence. Williams do not deny that Hoopiiainas have a right of way for a spur track. Williams filed a renewed motion to dismiss the Amended Complaint dated February 21, 2001, and in paragraph 8 thereof Williams allege: "Defendants have always acknowledged and agreed that Plaintiffs have the perpetual right to the use of the spur track right-of-way when a train is available to use said right-of-way and when Plaintiffs replace the tracks on Plaintiffs' and Defendants' property so that said spur track may be used. . . ."

The Court looks at the intent of the Agreement Creating the Right of Way. That agreement in 1947 provided in part, "said party of the first part hereby grants and conveys to said party of the second part a right of way over the real property above described of said party of the first part for a perpetual right of way of a spur track crossing said property of the said party of the first part to serve and for the use and benefit of the above described property of the second part." The first party retained a right to change the location of the spur track "providing that said right of way as changed will continue to permit the spur track to continue to serve the property of the party of the second part and to permit said spur track to enter the property of the second part at the same place as said spur track now enters the property of the said party of the second part."

The right of way was intended for use in connection with delivery of commodities to and from the buildings on Lot 6. There is nothing Hoopiiainas can do to use the right of way so long as the Williams have automobiles and other obstructions on the right of way in violation of the Hoopiiainas' rights under the Agreement to move commodities to and from their premises. From the documents it appears that the easement is seventeen feet wide, being eight and one-half feet

each side of the centerline. The use of the easement for railroad piggy back deliveries or truck deliveries, does not change the character of the easement. There is no evidence in the record that the use of trucks would increase the burden on the servient property. Mr. Richard Williams testified that he preferred the use as a railroad spur to avoid a muddy mess, however, since much of the easement has now been covered with asphalt and cement, it does not appear that the use by trucks would be an additional burden. Considering that spur tracks are not used as much now as in earlier times, and the intent of the Agreement that the easement be used to deliver commodities to and from the West one-half of said Lot 6, and there being no evidence that the use of the easement for other transportation such as piggy back deliveries and by trucks would increase the burden on Lot 5, the alternate means of transportation for the use and benefit of Lot 6 is a permissible use. The testimony of Marlin Forsyth that during many years of his observation prior to 1972 the easement was used for truck deliveries and for railroad cars being towed across the same by tractors, further indicates that the intent of the Agreement was to facilitate movement of commodities along the easement in any manner which accords with the practical necessities of the times and occasions.

7. The evidence is undisputed that the obstructions of the easement and the prevention of use of the easement by the Hoopiiainas were and are a result of the action taken by J. Richard Williams or at his direction with the knowledge and apparent consent of his "family" who may have held title to Lot 5 from time to time.

8. Williams' Answer to Amended Complaint, filed June 3, 2002, is untimely and should be stricken. The trial in this matter was held in April, 2002, on all outstanding issues. Therefore, the Answer filed post-trial should be stricken.

9. The Court's ruling on the merits of this lawsuit made at the conclusion of trial does not overrule Judge Wilkinson's decision in the earlier case between the same parties. The issue resolved by Judge Wilkinson was that Hoopiiainas had a perpetual easement. The issue in the instant lawsuit was the manner of use of the easement.

10. The second issue raised post-trial by Williams is whether the proper parties were before the Court in the instant lawsuit. The record reflects that the earlier lawsuit over which Judge Wilkinson presided, case number 920906000, the defendants in the instant lawsuit, Steven Williams and Kyle Williams, were plaintiffs. In that earlier lawsuit, both parties alleged and represented that they were the owners of the property in question which is the same piece of property in the lawsuit before this Court. Throughout this case, the parties named as defendants acknowledged that they were the owners of the property and raised no issue of ownership until following the trial. Based upon their representations and admissions in both lawsuits, those parties are estopped from denying any interest in the property in question. Additionally, it was these defendants who denied plaintiffs access to the easement and created obstacles to their use of the easement. The Court tried all of the issues framed by the pleadings and raised by the parties at the time of the bench trial in April, 2002. The issue of title to the property was not raised until after the trial had concluded.

For the above reasons, Williams' post-trial Motion to Dismiss should be denied, and Hoopiiainas should be awarded the relief as determined and ruled upon at the time of trial.

654

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Defendants' Answer to Amended Complaint, filed June 3, 2002, is untimely and is hereby stricken.

2. The post trial Motion to Dismiss and objections other than as to money damages filed by the Defendants are hereby denied.

3. The perpetual right of way granted by the Agreement Creating Right of Way is not restricted to use as a spur track when connected to a railroad track or train, and may be used for alternate means of transportation including, but not limited to, motor vehicle transportation, piggy back deliveries and like uses which do not increase the burden over that which prevailed using the easement for railroad deliveries.

4. The Defendants and any others having an interest in Lot 5, should be permanently enjoined from obstructing or interfering with Plaintiffs' use of the right of way, for all purposes which by law the exclusive right of way for a spur track may be used including motor vehicle transportation, which is no greater burden than rail transportation.

5. The evidence being that J. Richard Williams created the obstructions and prevented the use of the easement by the Plaintiffs, he should be ordered to remove all obstructions placed on the easement during his occupancy and control of Lot 5 within ninety (90) days from the date of entry of a Judgement and Decree herein, to permit the immediate use of the easement thereafter by occupants of the west one-half of Lot 6 for spur track and motor vehicle transportation. J. Richard Williams and other Defendants named herein shall be perpetually enjoined from interfering with Plaintiffs' use of the easement as herein specified.

655

6. Plaintiffs are entitled to costs.

DATED this 26 day of Nov, 2002.

BY THE COURT

DISTRICT JUDGE

156.

CERTIFICATE OF MAILING

I certify I mailed a copy hereof to Mr. Nolan J. Olsen, Attorney for Defendants, 8142 South State Street, Midvale, Utah 84087 this 12 day of November, 2002.

George K. Fadel #1027
FADEL ASSOCIATES
Attorney for Plaintiff
170 West 400 South
Bountiful, Utah 84010
Telephone: (801) 295-2421

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CUMA S. HOOPIIAINA, personal representative of the estate of Malualani B. Hoopiiaina, CUMA S. HOOPIIAINA, individually, and MARLIN M. FORSYTH, individually, Plaintiffs, vs. STEVEN WILLIAMS, KYLE WILLIAMS and J. RICHARD WILLIAMS, Defendants.	**AMENDED JUDGMENT & DECREE** Civil No. 950908402 CV Honorable Sandra N. Peuler

This cause came on regularly for trial before the Honorable Sandra N. Peuler, District Judge of the above entitled Court on April 23, 2002. The Plaintiffs appeared in person and by their Attorney George K. Fadel. The Defendants appeared in person and by their attorney Nolan J. Olsen. The Court received evidence of the issues raised by the Plaintiffs' Amended Complaint And Supplemental Proceedings and made bench rulings on some issues. The Court provided the parties an opportunity to file post trial memoranda on two issues for further consideration by the Court prior to a final decision. The Court having read the post trial memoranda, ruled upon Defendants' objections, and made and entered Amended Findings of Fact and Conclusions of

658

Law, now therefor,

IT IS ORDERED, ADJUDGED AND DECREED.

1. The Plaintiffs ("Hoopiiainas") are the owners and occupants of property at 345 West 700 South, Salt Lake City, Salt Lake County, Utah described as being the west half of Lot 6, Block 12, Plat "A" Salt Lake City, Survey. The Hoopiiainas also own a right of way over the real property of the Defendants ("Williams") described as Lot 5, Block 12, Plat "A" Salt Lake City Survey for perpetual right of way of a spur track crossing the property of the Defendants to serve for the use and benefit of the said west half of Lot 6, Block 12 as an appurtenance to that land in said Lot 6.

2. The perpetual right of way granted by the Agreement Creating Right of Way is not restricted to use as a spur track when connected to a railroad track or train, and may be used for alternate means of transportation including, but not limited to, motor vehicle transportation, piggy back deliveries and like uses which do not increase the burden over that which prevailed using the easement for railroad deliveries.

3. The Defendants and any others having an interest in said Lot 5, are hereby permanently enjoined from obstructing or interfering with Plaintiff's use of the right of way, for all purposes which by law the exclusive right of way for a spur track may be used including motor vehicle transportation, which is no greater burden than rail transportation.

4. The evidence is that J. Richard Williams created the obstructions and prevented the use of the easement by the Plaintiffs, he is hereby ordered to remove all obstructions placed on the easement during his occupancy and control of Lot 5 within ninety (90) days from the date of entry of a Judgement and Decree herein, to permit the immediate use of the easement thereafter by

659 HK8

occupants of the west one-half of Lot 6 for spur track and motor vehicle transportation. In the event J. Richard Williams and other Defendants named herein fail to comply within ninety (90) days, the perpetual injunction shall continue and shall be enforced as provided by law.

5. Plaintiffs are awarded costs.

DATED this 26 day of Nov, 2002.

BY THE COURT

DISTRICT JUDGE

660
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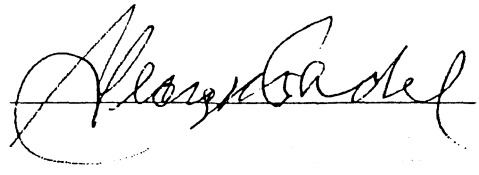
CERTIFICATE OF MAILING

I certify I mailed a copy hereof to Mr. Nolan J. Olsen, Attorney for Defendants, 8142 South State Street, Midvale, Utah 84087 this 12 day of November, 2002.



661